



Memorandum

To: Simon Pope, Manager Enforcement

From: Andre Baldock, Senior Investigator, Enforcement

Date: 9 June 2022

File Ref: 200720053

Subject: **BUPA Retirement Villages Ltd – Administrative penalty for retrospective consent**

For Your: **Approval**

Summary

1. This memorandum seeks your decision on the appropriate administrative penalty for Bupa Retirement Villages Limited's (**Bupa**) retrospective consent application to acquire an interest in sensitive land in breach of the Overseas Investment Act 2005 (**Act**).
2. Bupa applied for retrospective consent to acquire Villa 27 at 3 Liston Avenue, Taupo.¹ On 10 September 2021, Bupa entered into a sale and purchase agreement (**SPA**) with the vendor, Barbara Fray Craig (**Vendor**) to acquire Villa 27. This SPA was not conditional on Bupa obtaining consent under the Act to acquire Villa 27. Bupa and the Vendor later entered into a variation to the SPA on 29 November 2021 to include this condition.
3. Bupa also intends to acquire Villa [REDACTED] and has also sought consent to acquire Villa [REDACTED].
4. Bupa operates the Liston Heights Retirement Village (**Liston Heights**). Both Villa 27 and Villa [REDACTED] are located within the Liston Heights site. The previous owner of Liston Heights had sold the residential units on the site to third-party owners. These residential units are subject to a registered encumbrance that requires the units to be maintained as part of a lifestyle village for independent retired adults and for the operator to provide certain services to the owners (**the Encumbrance**). Villa [REDACTED] and Villa 27 are both subject to the Encumbrance.
5. Since acquiring Liston Heights in 2007, Bupa has re-purchased the residential units and offered occupation rights agreements (**ORAs**) under the Retirement Villages Act 2003 for the re-purchased units. Villa [REDACTED] and Villa 27 are the only remaining units located on the Liston Heights site that have not been re-purchased.
6. Bupa, and its legal advisors, s9(2)(b)(ii), did not identify the need for consent prior to signing the SPA as the process for acquiring the villas had been set up prior to the Residential Land changes to the Act in 2018 and was delegated to people on the ground in Taupo – rather than its senior acquisitions/property managers who normally handle the acquisition of development sites.
7. In our view, the breach was likely to have been inadvertent.

¹ Consent folder: <https://linzone/id:fA558686>. Apps Assessment Report: <https://linzone/id:A4896337>

Confidential and may contain legally privileged information

8. Bupa self-reported the issue to us after identifying the need for OIA consent when it went to complete the residential land statement as part of the pre-settlement process.
9. The regulator may require an administrative penalty be paid before deciding a retrospective consent application per s 53 of the Act, as further specified in the Overseas Investment Regulations 2005 (**Regulations**).
10. I recommend that, for the reasons set out in this memorandum, a \$20,000 administrative penalty be imposed given:
 - (a) the consideration paid is less than NZD 2 million
 - (b) the relevant tests for the application are the investor test; benefit to NZ test; and Residential Land outcome (the One Home To Live In pathway is not applicable)
 - (c) in the circumstances, that amount is not unduly harsh or oppressive given the nature of, and the reasons for, the retrospective consent.

Facts – why retrospective consent required

11. The facts of the case are set out more fully in the Enforcement Triage Report of 9 November 2022;² and the Assessment Report of 7 December 2022.³
12. As set out in the summary above:
 - (a) since acquiring Liston Heights in 2007, and prior to the 2018 changes to the Act, Bupa had re-purchased all but 2 of the 38 residential units and offered occupation rights agreements (**ORAs**) under the Retirement Villages Act 2003 for the re-purchased units
 - (b) Villa [redacted] and Villa 27 are the only remaining units located on the Liston Heights site that have not been re-purchased.
 - (c) Bupa, and its legal advisors, Anthony Harper, did not identify the need for consent prior to signing the SPA for unit 27 as the process for acquiring the villas had been set up prior to the Residential Land changes to the Act in 2018 and was delegated to people on the ground in Taupo – rather than its senior acquisitions/property managers who normally handle the acquisition of development sites
 - (d) Bupa submitted that the acquisition of Villa 27 was not in any way business as usual for Bupa (which typically involves acquisition of development sites)
 - (e) Anthony Harper and Bupa identified the need for OIO consent when completing the Residential Land Statement as part of the pre-settlement process.
13. The Applications Team is of the view that the investment meets the Act and is likely to be granted consent.⁴
14. In our view, the application meets the OIO retrospective policy:
 - (a) it meets the threshold criteria set out in para 14 of the Retrospective Consent Policy
 - (b) the breach was likely to have been inadvertent

² <https://linzone/id:A4711218>

³ <https://linzone/id:A4742624>

⁴ Applications Assessment Report: <https://linzone/id:A4896337>

- (c) Bupa self-reported the issue to the OIO and has cooperated with our enquiries.

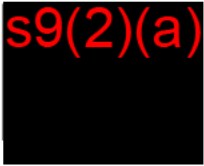
Assessment of appropriate penalty – for transactions on or post 22 October 2018

15. In accordance with regulation 36 of the Overseas Investment Regulations 2005, the amount of the retrospective penalty is \$20,000. I do not consider that requiring the applicant to pay this amount would be unduly harsh or oppressive given the nature of, and the reason for, the retrospective application. I discuss those matters in further detail below:

- (a) the asset is a unit in a 38 unit retirement village facility
- (b) consideration paid was \$500,000
- (c) Bupa is a large and sophisticated investor with significant local and global resources.

Recommendation

16. I recommend that the Regulator impose an administrative penalty of \$20,000. I do not consider the amount to be unduly harsh or oppressive having regard to the value of the consideration paid for the sensitive assets, or the nature of, and the reasons for, the retrospective consent.

s9(2)(a)


Simon Pope
Manager Enforcement

Agree: X
Disagree:

Date: